
U.S. Department of Labor
Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202
(513) 684-3252

Date Issued: June 22, 1984
Case No. 84-ERA-4

In the Matter of

ROBERT L. MURRAY
Complainant

v.

HENRY J. KAISER COMPANY
Respondent

Appearances:

Andrew B. Dennison, Esq.
For the Complainant

J. Patrick Hickey, Esq.
For the Respondent

Before: Daniel J. Roketenetz
Administrative, Law Judge

DECISION AND ORDER

Statement of the Case:

This matter arises under the Energy Reorganization Act of 1974, as amended (42 USC §5851, *et seq*.), hereinafter called

---

the Act. The Act prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected by the Act. The Act, designed to protect so-called "whistle-blower" employees from retaliatory or discriminatory actions by their employers, is implemented by regulations found at 29 CFR Part 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a complaint with the United States Department of Labor within 30 days after the occurrence of the alleged violation.

Robert L. Murray, the Complainant in this matter, filed a complaint with the Wage and Hour Division, United States Department of Labor, on November 23, 1983, alleging that he was terminated from his employment with the Respondent on October 31, 1983, because he engaged in certain activities protected by the Act. (Admin. Ex. 1).[1]

Thereafter, on December 22, 1983, following its investigation, the Wage and Hour Division issued its Notice of Findings, stating, *inter alia*, "that discrimination as defined and prohibited by the statute was a factor in the actions which comprised [Murray's] complaint". It was further found that:

> The Complainant was terminated within a short period of time after expressing concerns to supervision regarding the handling of quality assurance records. Our investigation indicated that he was terminated as a result of making these statements. (Admin. EX. 2)

On December 28, 1983, the Respondent filed a timely telegraphic request for a formal hearing. (Admin. Ex. 3) Pursuant to notice, this matter was exhaustively litigated before the undersigned at Cincinnati, Ohio, on March 5-9, 1984. The parties were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. At the request of the parties following the conclusion of the hearing, simultaneous post-hearing briefs were submitted on April 30, 1984. The hearing transcript, consisting of nearly 1600 pages, in excess of 100 exhibits offered at the hearing, the testimony of witnesses (both *viva voce* and depositional),

---

the arguments of the parties and post-hearing briefs have been carefully reviewed and considered by me in reaching my findings and conclusions. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Timeliness of Complaint:

The record discloses, and I find, that the complaint was filed within the time limits set forth in the Act and the implementing regulations. (29 CFR §24.3)

Jurisdiction:

The Respondent concedes, and I find, that the Office of Administrative Law Judges, United States Department of Labor, has jurisdiction to decide the issues raised by the pleadings in this case. However, this office does not have jurisdiction to decide any issues relative to the quality of construction or whether there were violations of quality assurance or quality control procedures, those questions being within the province of other federal regulatory agencies. Therefore, any references to such matters in this Decision and Order are not to be construed as findings in that regard.

The Respondent does not contest, and I find, that Henry J. Kaiser Company, the Respondent, is an employer within the meaning of the Act. Likewise, I find that Complainant, Robert L. Murray, is an employee within the meaning of the Act and entitled to the protection accorded by it.

Issues Presented:

It appears, after an examination of the pleadings, that the primary issues to be resolved in this case are:

1. Whether the Complainant's discharge of October 31 was for reasons proscribed by the Act;

2. The Complainant's employment status following the apparent rescission of his October 31 discharge; and,

3. Whether the Complainant's subsequent termination on November 3 was motivated by activities protected by the Act.

[Page 4]

Background:

At all times relevant to this proceeding, the Respondent was the general contractor for the construction of the Zimmer Nuclear Power Station located at Moscow, Ohio, The plant was being constructed for Cincinnati Gas and Electric Company (CG&E), among others.

On or about March 31, the Complainant became a direct employee[2] of the Respondent as a senior quality record analyst. The Complainant was initially assigned to work in the Civil/ Structural and Pipehanger Document Section under the supervision of Milt Bussell. Thereafter, on April 4, the Complainant was certified as a Level II document examiner.

Complainant worked in the Civil/Structural Division until early October when he was transferred to the supervision of Deal Watkins in the Hanger Group. The hearing

testimony tends to establish the transfer date as October 5, although an internal memorandum from Mark Edmonds, dated October 14, indicates a later date for the reassignment. (Compl. Ex. 21) At any rate, the Complainant worked in the Hanger Group until October 31. On that date, he was terminated by the Respondent allegedly for absenteeism.

At his discharge interview conducted by a personnel official named Mike Cavanaugh, the Complainant raised several general contentions pertaining to alleged procedural and safety violations. According to cavanaugh, the Complainant first inquired whether the Respondent was going to pay his relocation expenses (apparently back to Kansas, the Complainant's home). it was after being told that Respondent was not going to pay such expenses because he was being terminated for cause rather than being laid off that the Complainant made allegations pertaining to safety and procedural violations.[3]

Upon the expression of the Complainant's allegations, Cavanaugh summoned several high-ranking officials of the Respondent, including Richard Davis, quality assurance manager; James P. Murray, records manager; M. Noffsinger, project director; Steve Armknecht, personnel manager; Dwight Tolley, project director (Oakland); and Henry Caldwell, administrative assistant to the quality assurance manager, among others. during the course of this meeting, Complainant again made his

---

allegations pertaining to procedural and safety violations and, according to his testimony, he convinced those present that he was being terminated by Deal Watkins because he had raised safety concerns in the Hanger Group just a few days earlier. According to the Complainant, those present agreed that, his termination was precipitated by his safety complaints in that department.

Exactly what went on in this meeting was hotly disputed during the course of the hearing. Complainant asserted that not only did officials of the Respondent agree that he was being terminated unjustly, but also his termination was rescinded absolutely and converted into a final warning for a period of time during which any further absences would have to be directly approved by Richard Davis. Respondent counters that the termination was not rescinded, but that it was, in essence, only suspended for a short period of time in order to afford the Complainant an opportunity to compose a written report outlining the procedural and safety violations observed by him during his employ at Zimmer and to propose appropriate corrective action. Given the obvious extremes of these conflicting versions, the truth no doubt lies somewhere in between. Notwithstanding the final resolution at that meeting, the record is clear that the termination notice was marked rescinded and the notification to the payroll department was voided. The Complainant was instructed to return to the site on November 1 to compile his report for Mr. Davis' consideration.

The following day, the Complainant returned to his regular work station in the Hanger Group where, according to the Complainant, Supervisor Watkins greeted him with, "I see the dead do arise". While the Complainant made an obvious effort to emphasize this remark in his complaint, in an affidavit to the NRC, in his pre-hearing deposition and at the hearing of this case, the particular significance of Watkins' alleged remark continues to elude me. I think the Complainant wishes me to infer that Watkins' remark demonstrates hostility toward him because of his protected activities. However, the remark could be just as easily construed as an off-handed, innocuous comment of a surprised manager who, as the record reflects, had not been advised by his superiors that Complainant's termination had been rescinded.

Shortly after Complainant's return to his department,

[Page 6]

James Murray instructed watkins that Complainant was to be engaged in writing a report for Richard Davis and that he was not to be doing his normal work. Murray also instructed Watkins that the Complainant should not be disturbed while he prepared the report. Watkins then apparently took it upon himself to place the Complainant in an area a short distance away from his usual work place, but which was physically isolated from other employees. Complainant immediately protested that he was being isolated and harassed because he had made complaints concerning quality and procedure. James Murray was contacted by Mr. Watkins in the presence of the Complainant, aid the Complainant was reassigned to his usual work area. Shortly thereafter, Watkins conducted a meeting with the hanger staff, with the exception of the Complainant. During the meeting, watkins instructed other employees that they were not to disturb the Complainant as he was in the process of preparing a report for Mr. Davis.[4] After the staff meeting, Complainant states that he felt he was being harassed by Watkins and intimidated by his fellow employees, who told him repeatedly in a joking manner that they could not communicate with him. Upset over this treatment, Murray testified that he tried to contact Richard Davis to resolve the situation. Davis, attending a meeting, was unavailable. Complainant then went to the office of Mr. Armknecht, where he turned in his badge and left the premises, claiming harassment and intimidation.

Later that evening, the Complainant attended a public hearing being conducted by the NRC at the Convention Center in downtown Cincinnati. During the course of that meeting, which was also attended by Richard Davis, Davis approached the complainant and asked him if he had simply left the premises or had quit. Complainant responded that he had left the premises. Davis then asked Complainant to call him the next day to arrange Complainant's return to the project. On November 2, complainant did as instructed, calling Mr. Davis and arranging to return to the project on November 3.

When Complainant reported for work on November 3, he was issued a visitor's pass and was taken to James Murray's office by Henry Caldwell. Murray advised the

Complainant that Mr. Davis had instructed him to provide the complainant with an area and materials where the Complainant could complete his

---

[Page 7]

report. Complainant requested that he be permitted to make a report to the NRC concerning the alleged harassment incident of November 1. Caldwell escorted Complainant to the NRC office and, at the Complainant's request, Caldwell remained during the course of that meeting.

At the meeting with NRC representatives, the Complainant advised them that he had certain concerns about the project, specifically with unauthorized individuals having access to quality documents and alleging that quality assurance documents were being thrown away. When requested to provide more details, he responded that he was preparing a report for Quality Assurance Manager Davis, and if the NRC wanted to know more details, it could contact Kaiser to obtain a copy of the report.

On instruction of Richard Davis, Complainant was then escorted by Mr. Caldwell to the office of D. Cruden, an official of CG&E. Cruden asked the Complainant what his concerns were and what he had discussed with the NRC. According to the Complainant, he told Mr. Cruden of his concerns about quality documents being destroyed, unauthorized personnel having access to documents and difficulty with Kaiser management, namely Deal Watkins and an unknown quality control supervisor. Complainant further informed Cruden that he was in the process of writing a report for Mr. Davis. Complainant also told Cruden that Deal Watkins had isolated him from his usual working place and tried to relocate him outside the work area, and when he had been allowed to return to the work area after complaining, fellow employees were told not to talk to him.

Following the meeting with Cruden, Caldwell took Complainant to Richard Davis' office. According to the Complainant, Caldwell went into the office, leaving Complainant waiting outside. There was another person present in Davis' office at the time, the identity of whom was unknown to the Complainant, but who, in any event, left Davis' office when Caldwell arrived. Complainant testified that when the unknown person left Davis' office, Caldwell closed the door, but he could plainly hear the conversation between the two men. Complainant relates that Caldwell told Davis that the Complainant had complained to the NRC about Deal Watkins. Complainant contends that when Caldwell related that formal charges had been filed against Deal Watkins, Davis responded in a loud voice, "Terminate him".

[Page 8]

Complainant testified that Davis' secretary returned at that point, and he moved away from the area of the office and could no longer hear the conversation between the two.

Following Caldwell's meeting with Davis, the Complainant was shown to a work area where he commenced working on his report. Shortly after noon, James murray and Richard Davis came to the Complainant's work place and asked him to accompany them to Mr. Cruden's office. Cruden advised the Complainant that he was being terminated for absenteeism. Complainant was then processed through an exit interview and left the premises.

On the basis of the foregoing facts, the Complainant contends that he was unlawfully terminated in violation of the Act. From a remedial standpoint, he seeks backpay for approximately two weeks (to November 17), at which time most, if not all, of the Hanger Department employees were laid off; and a finding that his status should be that of a laid-off employee rather than terminated for cause so as to entitle him to relocation benefits,[5] compensatory damages and attorney fees.

Whether the Stated Reason for Discharge,.i.e., Absenteeism, Was Pretextual:

The Complainant argues in his complaint that the stated reason for his discharge by the Respondent, namely absenteeism, was a pretext and only used to cover up the real reason for his discharge, his protected activities. A "pretext" in the field of labor relations is a word of art which generally means that "the purported rule or circumstances advanced by the [respondent] did not exist, or was not, in fact, relied upon [sic]." *Peavey v. N.L.R.B.*, 648 F. 2d, 460, 462 (7th Cir. 1981) citing *Wright Line*, 66F F.2d 899 (1st Cir. 1981).

In the instant case, the reason advanced clearly was not patently false. There is no doubt from this record that the Complainant had a problem with absenteeism. He had been warned on prior occasions concerning his absenteeism, and he had, in fact, admitted as recently as one month prior to his discharge that he had an absenteeism problem.[6] Moreover, the absenteeism reason for discharge was not, on its face, frivolous, inadequate or unbelievable as a motivation for the action

---

taken by the Respondent. The Respondent presented abundant evidence to demonstrate that it was concerned about chronic absenteeism on the worksite in the two month period preceding the Complainant's discharge; that numerous memos had issued on the subject; that the files of several employees had been reviewed; and that two other employees were discharged for the same reason on the same date as Complainant. Based on the foregoing, I find that the expressed reason of "absenteeism" was not a pretext to disguise a purportedly unlawful one. Absenteeism was a real problem with the Complainant, and it was a legitimate area of concern for the Respondent.

Whether Dual Motives Existed for the Discharge of the Complaint:

When the reason advanced for the termination is found not to be pretextual in nature, the next area of inquiry is whether, given the existence of a legitimate motive, the alleged

wrongdoer was motivated by unlawful reasons rather than lawful reasons in effecting the discipline. In a dual or mixed motive situation, the employee must prove by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, whereupon the burden of proof or persuasion shifts to the Respondent to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *NLRB V. Transportation Management Corp.*, ____ U.S.____, 51 USLW 4761, 103 S.Ct. 2469 (1983); *Landers v. Commonwealth Lord Joint Venture*, 83-ERA-5, Decision and Final Order of the Secretary (September 9, 1983); *Dartey v. Zack Co. of Chicago*, 82-ERA-2, Decision and Final Order of the Secretary (April 25, 1983). Simply stated, the evidence demonstrates on behalf of the complainant that the Respondent was motivated by unlawful reasons, as well as lawful reasons for the discharge, then the burden shifts to the Respondent to show that notwithstanding the employee's protected activities, he would have still been disciplined. It is noted that the ultimate burden of persuasion, however, always remains with the party contending a violation of Law.

Complainant argues that, despite his earlier absenteeism problems, his record had improved since August and, therefore, an unlawful motivation by the Respondent to terminate him is shown. Furthermore, the Complainant asserts, and would have me

---

[Page 10]

believe, that he was a highly vocal individual who, at every opportunity in his employment with the Respondent, expressed concerns over procedural and safety violations and attempted corrective action.[7] At the hearing, he further contended that the earlier warnings given to him for absenteeism and other on-the-job problems (See fn. 6 above) were also precipitated by his expressions of concern in the area of safety and quality. Aside from the fact that these assertions are conspicuously lacking in the complaint and pre-hearing deposition, Complainant's testimony in this regard is fraught with inconsistency and conflict. Moreover, his assertions that he was a spokesman for the group is simply not borne out by the voluminous record before me. Witness Mitchell, who testified on behalf of the Complainant, stated that Complainant did speak up at some of the meetings and that Watkins became upset with Murray in at least one such meeting. However, Mitchell also testified that other employees, including himself, raised the same or similar issues with their supervisory personnel yet there is no evidence that any of those persons were retaliated against because of their activities.

Complainant also testified that he had heard a few days prior to his discharge from some unidentified persons that Watkins was trying to get him fired. Yet, the record is clear that having heard this, he did nothing to protect his interests. He testified that on October 31, the day he was discharged, he asked Watkins three times if this was the day he was going to get fired and that Watkins wouldn't acknowledge it. Significantly, there is no mention of these events in his complaint; and in his deposition testimony, Complainant relates that he discovered that he was going to be fired on the 27th or 28th of October, learning it from a note that went over to payroll, again from some

unidentified person (Resp. Ex. 54, p. 209) Irrespective of how he found out that he was going to be discharged; if in fact he did learn of that, it is incredulous to me that he took no action to thwart Watkins' efforts. His testimony is that he felt he was being harassed for his articulation of safety and procedural items. He testified that he had learned Watkins was out to get him, but he did nothing about it. Only a few days earlier, the Complainant had signed a confirmation. statement that he had read certain policy statements issued by CG&E and Bechtel Power Corporation pertaining to the Quality Assurance program. (Resp.

[Page 11]

Ex. 5) Among other things, those memoranda advised Quality Assurance personnel that if they felt they were being harassed, they should contact certain named officials of CG&E or Henry J. Kaiser, whose telephone numbers, as well as the onsite telephone number of the NRC representatives, were provided. The Complainant's inaction is especially revealing in the events that followed his initial discharge.

One of Complainant's chief concerns was that of purging packages in the Hanger Department. He contends that he did the job begrudgingly and that he threw away only blank papers, retaining duplicates. He testified that he did not like to work to "verbals" and that he complained, making it plain that he was going to do the packages as he "seen fit" and take out what "I Seen fit". He stated he was trying to comply with the work. In his complaint and statement to the Nuclear Regulatory Commission, Complainant took credit for being the reason that the purging of packages stopped. However, at the hearing, he testified that the purging stopped after he complained, but he doesn't know if it was related to his complaint or whether the job simply was finished. Moreover, the discovery of a document being improperly discarded was brought to the attention of Watkins not by the Complainant, but by another employee, Steve Baron.

One of the more telling aspects of the Complainant's case is that he never took any action beyond Watkins in dealing with his alleged safety and procedural concerns. He never filed a corrective action report, although he did admit at the hearing that that would have been a proper vehicle for his complaints. He testified that he attempted to resolve matters in-house and didn't see any need to do anything further. Moreover, the incidents related by Complainant, which he contends formed the real basis for his termination, appear to me to be more directed at protecting his own interests, than effecting the broad policies of the Energy Reorganization Act. For example, he testified that he objected to an individual from another department taking a package of documentation without properly signing for it because he would ultimately be responsible for it. In the area of purging packages, it was apparent that it was not the act of purging that was considered improper, but that written procedures had not been established.

For the purposes of this Decision, I assume, without

[Page 12]

deciding, that Complainant's activities were of the type protected by the statute. Nevertheless, certain critical elements must be demonstrated in order to establish a *prima facie* case of unlawful discriminatory discharge. First, I note that except for the testimony of the Complainant and David Mitchell, there is no evidence in the record to demonstrate that watkins harbored any animus toward the Complainant because of his having engaged in protected activities.[8] In fact, the Complainant testified that his relationship with Watkins was good until around October 24. Even the Complainant's testimony regarding evidence of hostility toward him by Watkins was rather vague and evasive and amounted only to Watkins allegedly telling him that he shouldn't talk about such matters any more or that he didn't want to hear about it or words to that effect. My only observation here is that threats of retaliation tend to be seared into the memory of an employee; such comments are not easily forgotten.

Also lacking in this record is any evidence that the individuals who precipitated the discharge of the Complainant knew anything of his alleged protected activities. The thrust of the complainant's assertions are that watkins initiated his discharge and effected it in retaliation for his protected activities.[9] Yet, at the discharge interview of October 31, Complainant himself testified that Richard Davis, who approved the termination decision of James Murray, was surprised by Complainant's allegations. Complainant also testified that James Murray was surprised by the allegations made by him at the exit interview. While the fact that Davis and Murray were surprised does not preclude the fact that Watkins engineered the discharge of the Complainant, I find it highly unlikely. The evidence reflects that Watkins, a contract employee, knew prior to the Complainant's discharge that he himself was going to be terminated on November 5 as a result of the expiration of his contract. It simply does not make sense, having that knowledge, that he would attempt to arrange a retaliatory discharge when he would be gone in a few days and no longer have to deal with the Complainant in any event. Moreover, James Murray credibly testified that the decision was made by him to terminate the Complainant and others solely upon the basis of their attendance and overall work records as early as late September.

[Page 13]

Based on the foregoing and the record as a whole, I find and conclude that the Complainant was terminated on October 31 for reasons other than those which are prescribed by this Act. Given my finding that no unlawful motivation was involved in effecting the discharge, it is unnecessary to consider the legitimacy of the absenteeism reason advanced by the Respondent in this case. The fact that the Ohio Bureau of Unemployment Services has found that the Complainant was not discharged for cause does not alter this result.

The Effects of the Subsequent Rescissions of the October 31 Discharge:

If anything was demonstrated during the course of this hearing, it was that the management of this particular project was a rambling bureaucracy and a classic example of the right hand not knowing what the left hand was doing. At the exit interview, the Complainant mentioned safety concerns and was almost immediately surrounded by a throng of high-ranking officials who tried to ferret out those concerns from the Complainant to no avail. The outcome of the meeting was that the Complainant was to write a report for Richard Davis; beyond that, it was anybody's guess as to Complainant's status. it would appear that, as suggested by the Complainant, the termination was rescinded and the Complainant was fully restored to the status of an employee. Initially, I was impressed with that notion. However, after further analysis, I believe what was really intended was that the termination only be suspended during the pendency of the report preparation by the Complainant. Why the Complainant was not reassured of the Respondent's concern for safety on the project and thanked for expressing his rather general, nonspecific concerns and letting the termination stand, I'll never fully understand. I suspect it may have been due, at least in part, to the number of management personnel involved in that particular meeting, the effect of which usually results in further meeting or further study, hence the report.

To complete this scenario is the Complainant, who impressed me as a manipulative individual who, having discovered the consequences of being terminated for cause (i.e., losing his relocation benefits), was attempting to maneuver himself into a protected posture. That the Complainant was not above stretching the truth a little bit to obtain the desired results is

---

adequately demonstrated in this record. On cross-examination, for example, it was shown that Complainant had misrepresented his educational experience on his application for employment. He stated in the application that he had graduated from high school with a 3.0 average when, in fact, he did not. He then asserted that he had a graduate equivalency degree and then eventually admitted that he did not. With regard to the employee handbook, the Complainant testified that he signed the torn-out back page acknowledging that he had read it, but that he had never been provided with a copy of the handbook either at his employment interview or subsequent thereto. His denials of having received the handbook were less than convincing on cress-examination and are not credited.[10]

Finally, there are a number of memorandum written by persons who attended the exit interview on October 31. (Resp. Exs. 25, 31, 32) Except for the common denominator that Complainant was to prepare a report, there is substantial variance regarding Complainant's continued status as an employee and the length of time he would have been retained as an employee. As noted earlier; upon a review of the testimonial and documentary evidence surrounding the impact of this meeting, my instinct tells me that the collective corporate mind probably intended only to suspend the Complainant's termination. However, because of the lack of adequate explanation of the meaning of the notes made contemporaneously with the meeting or shortly thereafter, and the vagueness

of the hearing testimony, I resolve this issue in favor of the Complainant and find that he was restored to the status of an employee for an indeterminate period of time.

The next question is whether the Complainant's termination of November 3 was based upon his having made complaints to the Nuclear Regulatory Commission or for having engaged in any other protected activities.

The Incidents Surrounding the November 3 Discharge of the Complainant:

As earlier related, the Complainant contends that on November 1, when he returned to work following the rescission of his termination the day before, he was harassed and intimidated by Supervisor Watkins and by his fellow employees.

[Page 15]

Because of such harassment and intimidation, the Complainant left the premises. Again, consistent with earlier actions, the Complainant did not report the alleged incidents of harassment and intimidation to the onsite NRC officials.[11] Rather, he attended the public hearing at the Convention Center purportedly to do so. Apparently, before he got a chance to report the events of that day, he was invited back to the site to complete his report for Mr. Davis. Why Davis asked the Complainant to report to work after he had quit will, like several aspects of this case, remain a mystery.

The events of November 2 are simple enough. Complainant communicated with Mr. Davis, and they struck an agreement that Complainant would report to the site the following day. Whether any management decisions were made concerning the Complainant that day are not disclosed on this record.

On November 3, the Complainant's termination slip and payroll notification were rescinded and voided, respectively, again for reasons not adequately explained in this proceeding. Accordingly, as of November 3, I find that the Complainant was reinstated to his status as an employee, and Respondent's assertions to the contrary are rejected. If Complainant's version of the events that followed that day are to be believed, then a textbook violation of the Act could be found. In essence, he contends in his complaint that upon his return to the jobsite he requested to see NRC representatives, at which time he reported the incidents of intimidation and harassment. Subsequent to the meeting with the NRC officials, he was escorted by Henry Caldwell to the vicinity immediately outside Richard Davis' office and, in a closed door conversation between Caldwell and Davis, Davis was overheard by the Complainant to may "terminate him" upon Caldwell's report of what the Complainant had reported to the NRC. Before proceeding to a consideration of events later that day, I consider only what has been related thus far.

In his complaint, the Complainant states that when he met with James Murray upon his return to the site on November 3, he told Murray that the meeting held by Mr. Watkins should be reported to the NRC. Complainant recites, "I felt that I was being harassed and

insisted on reporting the incident to the NRC. In order to resolve the issue, I felt that it had to be

---

[Page 16]

reported. They didn't say much, except that I had the right to go to the NRC." At the hearing; however, the Complainant testified that he told James Murray that the incident of November 1 with Watkins should be reported to the NRC and that Murray agreed that it should be reported and that it already had been reported to the NRC. Further, the Complainant testified that when he arrived at the NRC Office the officials there indicated that the incident had already been reported to them. This testimony is a far cry from the insistence of the Complainant to go to the NRC with the implied reluctance on the part of James Murray to permit him to do so. Moreover, Richard Davis' uncontradicted and credited testimony is that he reported the incident himself to the Nuclear Regulatory Commission upon learning of the Complainant's departure from the worksite on November 1.

Whether a violation of the Act is made out now hangs by the slender thread of the Complainant's testimony that Davis called for the Complainant's termination upon being advised of the Complainant's visit to the NRC. For the reasons hereinafter stated, I find that the Complainant's testimony is not worthy of belief, and it is specifically discredited. First, as pointed out by the Respondent, it is highly unlikely that a person who just had overheard that he was being terminated because he went to the Nuclear Regulatory Commission would be so nonchalant under these circumstances. Rather, just having heard that he was going to be terminated because he visited the NRC, according to his testimony, he simply went to work and commenced writing his report, not complaining to anyone about what had just transpired. Second, the Complainant testified that the first time he knew he was being terminated on November 3 was when he was told as much by CG&E official Cruden. He testified that Cruden "dropped a bomb" on him when he was so told. Again, when Cruden advised him he was being terminated, he didn't protest or bring to Cruden's attention what he had overheard Davis say, nor did he tell officials of the NRC on his second visit that day following his termination by Cruden. Further, as noted earlier, I have considerable difficulty with the Complainant's overall credibility. Coupled with other inconsistencies in his testimony and the obvious fallacies surrounding the alleged statements by Davis, I do not accept his version of events.

We finally come around to the ultimate question as to

[Page 17]

what precipitated the "final" discharge of the Complainant on November 3. It clearly appears from the record that the Complainant was discharged upon the insistence of Admiral J. Williams, senior vice president - nuclear, for CG&E. it is not clear whether CG&E reserved the right to request the termination of employees it deemed

unsatisfactory. I can only assume that it did, since Respondent acted upon Williams' instructions to terminate the Complainant. James Murray testified that he met with Admiral Williams on the morning of November 3 after the Complainant had returned to the worksite. They reviewed the Complainant's work record, and Williams took the position that the Complainant ought to be terminated based upon his absentee record; he wanted to know why he had not been fired earlier; and he wanted to know why the person who permitted the excess absenteeism of the Complainant had also not been terminated. According to Murray, Admiral Williams took the position that the company was not going to be black-mailed into keeping an unsatisfactory employee simply because he raised complaints about safety. Pursuant to Williams' instructional Davis and Murray then proceeded to finally effect the Complainant's termination.

Given my discrediting of Complainant's version of events, which would have demonstrated a violation of the Act, all that remains is a mere suspicion that the Complainant was terminated on November 3 for protected activities. However, the Complainant must demonstrate by a preponderance of the evidence that he was terminated for unlawful reasons, and mere suspicions certainly do not rise to that level.

In any event, I find it highly unlikely that the Respondent would have placed itself in such a vulnerable position on November 3. Complainant had finally found his way to the NRC office just a few hours earlier; the Respondent was fully aware of his visit; and the information related by Complainant to the NRC was nothing new. The Respondent simply did not have anything to gain at this juncture by terminating complainant for unlawful reasons. To suggest the savings of a few thousand dollars in relocation expenses strikes me as ludicrous; while substantial to the Complainant, it would only be a miniscule amount to the Respondent considering the magnitude of the project.

Lastly, I note that two other employees were terminated

---

on the same day as Complainant for absenteeism. There was no attempt by Complainant to show that these terminations were only a coverup for his alleged unlawful discharge. Rather, the only evidence adduced was that Mark Braun had an absentee record equivalent to Complainant, yet there was no action taken against him. The Braun situation is easily distinguishable from that of Complainant since the record reflector that his absence rate was significantly less than that of Complainant. Moreover, unlike Complainant, Braun's file reflected advance written requests to be absent which were approved by management.

Conclusion:

For the foregoing reasons and the record as a whole, I find and conclude that the Complainant was not terminated on October 31 because of any activities protected by the Act; that he was reinstated as an employee an October 31 and again on November 3; that

he was not unlawfully harassed and intimidated on November 1; and that his termination on November 3 was for reasons not prescribed by the Act. Accordingly, no violation of the statute has been demonstrated, and the Complainant is not entitled to a remedy.

Attorney's Fees:

Since the Complainant has not prevailed in this proceeding, no attorney's fees or costs are assessed against the Respondent.

RECOMMENDED ORDER[12]

IT IS RECOMMENDED that the complaint in this matter be dismissed.

DANIEL J. ROKETENETZ
Administrative Law Judge

[ENDNOTES]

[1] In this Decision and Order, "Admin. Ex." refers to administrative exhibits; exhibits; "Compl. Ex." refers to Complainant's exhibits; and "Resp. Ex." refers to Respondent's exhibits. Unless otherwise noted, all dates will be during the calendar year 1983.

[2] As opposed to a contract employee or Job-shopper.

[3] Complainant's deposition testimony corroborates Cavanaugh's testimony. (Resp. Ex. 54, p. 262) Complainant stated that it was after Cavanaugh said that the Respondent would not pay relocation benefits. "That's when we decided that maybe I better talk to Mr. [Richard] Davis, which they brought in other people."

[4] David Mitchell, a witness or the Complainant, testified that Watkins told employees that Complaint was working on a special project for Mr. Davis in a different area and, therefore, there was no need to talk to him.

[5] Relocation benefits or laid-off employees are significant, consisting of severance pay based on length of service, two weeks pay in lieu of notice, all accrued vacation, relocation to the point of origin or an equivalent distance, up to 30 days living expenses (at $25 per day per family member), mileage expenses and moving expenses.

[6] On July 13, 1983, Complainant was warned by Milt Bussell for failure to notify Respondent of an absence from work. (Resp. Ex. 14) On August 23, 1983, Complainant was given a formal written warning because of "conduct not conducive to organizational efficiency." (Resp. Ex. 15) On the same date, Complainant was given a second formal written warning for "absenteeism" and placed on probation until December 30. (Resp. Ex. 16) In an appraisal received and signed by Complainant on September 29, it was noted that "[e]xcessive absenteeism has been a detriment to Bob's overall contributions." In signing off on the document, Complainant wrote, "Absenteeism will improve." (Resp.

Ex. 18) Finally, in a memo dated october 14 from M.A. Edmonds to James Murray, it is stated that Complainant's "record also indicates a poor attendance record and previous warnings regarding his job performance/attendance record." (Reap. EX. 19) It is noted that all of the above documentation originated before the events which Complainant contends precipitated his alleged unlawful discharge.

[7] I am compelled to comment that after having heard all the Complainant's testimony in a five day trial, having read and reread the transcript and deposition testimony, I am still not sure of the exact nature or substance of the Complainant's safety concerns. Whenever pressed for details, he could not remember details. Thus, Complainant could not recall names of those employees who were not qualified to perform quality assurance tasks. When asked to identify applicable regulations that were being violated, he was unable to do so. ". . . [H]e forgot; it's much safer to forget, and it stands a better cross-examination." *McGinley v. Cleary*, 2 Alaska Reports 269, 273 (1904).

[8] Mark Geyer, a lead man in the Hanger Department, testified that he had never observed any hostility toward Complainant by Watkins. I found Geyer to be a particularly impressive witness, whose testimony was believable. On the other hand, Mitchell seemed to harbor some anger toward the Respondent for reasons which this record does not reflect. Nevertheless, I found his general demeanor to cause his testimony to be far less convincing than that of Geyer on the same subject matter.

[9] The record is clear that Watkins had no direct authority to discharge employees. The lowest tier of authority was James Murray. See testimony of Francis McCrystal. (Resp. Ex. 50)

[10] Had the Complainant signed a copy of the tear-out page rather than a page actually torn from a handbook, his testimony would have been more believable. Since an actual tear-out page existed, one can assume the existence of the book from which it was removed.

[11] There is no showing that intimidation by employees was instituted by Watkins as an agent of Respondent. Thus, no wrongdoing can be imputed to the Respondent. As far as harassment by Watkins, I find that there is no merit to Complainant's contention. At best, all that is demonstrated is that he was guilty of judgment errors in assigning Complainant to a separate work area and telling employees not to speak to Complainant. It would be only upon a Strained inference that I could conclude that Watkins' conduct violated the Act.

[12] 29 CFR §24.6